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Supreme Court of the United States

OCTOBER TERM—1950

No. 619

ZAREH NUBAR,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HENRY MANNIX,
Counsel for Petitioner.

CHARLES K. RICE,
Of Counsel.

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The petitioner prays that a writ of certiorari issue to review the judgment (R. 54) and the order denying rehearing (R. 85) of the United States Court of Appeals for the Fourth Circuit, which judgment and order reversed the decision of The Tax Court of the United States (R. 26).

Opinions Below

The opinion of the Tax Court is reported in 13 T. C. 566. The opinion of the Court of Appeals is reported in 185 F. (2d) 584. The *per curiam* opinion of the Court of Appeals denying petition for rehearing is reported in 185 F. (2d) 589.

Jurisdiction

Jurisdiction to issue the writ prayed for is vested in this Court by the Act of June 25, 1948, as amended by the Act of May 24, 1949 (28 USCA, Sec. 2101(c)). The order of the Court of Appeals denying rehearing was entered on December 20, 1950 (R. 85).

Questions Presented

1. Was the petitioner a resident or nonresident alien for Federal income tax purposes for the taxable years 1941 through 1944?

2. If petitioner was a nonresident alien, was he during such period engaged in trade or business in the United States by reason of his transactions in securities and commodity futures effected through United States resident brokers?

Statute and Regulations Involved

The statute and regulations involved are set forth in an Appendix to this petition.

Statement of the Case

This proceeding arises under the Federal income tax laws and involves the taxable years 1941 through 1944. The petitioner is an Egyptian citizen. His home is in Paris, France where he has resided for many years. On August 1, 1939, he came to the United States on a visitor's visa to see the New York World's Fair, to talk with Dr. Einstein and to travel in the United States and later in Central and South America (R. 9-11). His purposes in coming to the United States were unassociated with war or the prospect of war (R. 11). The petitioner's wife and two children remained at the family's summer home in Switzerland until May 1940 when they went to France, returning to their home in Switzerland early in 1941 (R. 14). The petitioner visited the World's Fair intensively, had an interview with Dr. Einstein and traveled in the United States (R. 14, 15). In April 1940, he visited the West Coast and made the first of four attempts to leave the United

States and enter Mexico (R. 12, 15). He then intended to continue on his travels to Central and South America and not to return to the United States (R. 12). The petitioner's application to enter Mexico was denied (R. 12). He renewed his attempt in June 1940 and this application was likewise denied (R. 12).

Petitioner returned to New York and in July 1940 made a third unsuccessful application to enter Mexico (R. 12). In the summer of 1940, he was advised by the French Consulate in New York that he could not return to France, occupied or unoccupied (R. 12). Petitioner thereafter went to Florida where in February 1941 he made his fourth application to go to Mexico which was again denied (R. 13). Returning to New York, he applied in April 1941 for a Swiss visa to join his family in Switzerland (R. 13). He also applied for French, Spanish and Portuguese visas, which he needed to travel through these countries on the way to Switzerland (R. 13). He was unable to obtain such visas, however (R. 13). A Swiss visa was granted to him in August 1941, but was valid for only one month beyond the date of receipt and was of no practical value without the visas for the intervening countries (R. 13). Unable to rejoin his family in Europe, petitioner remained in the United States until August 1945 when the termination of hostilities in Europe enabled him to depart and return to his home in France where he has lived ever since (R. 10). He remained in the United States for all this period only "because of the obstacles which war time conditions put in the way of his leaving the country and going to another one in which he could be admitted" (R. 22).[1] His desire and

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[1] Petitioner was but one of many aliens unable to leave the United States during the war and return to Europe because of visa complications, restricted shipping space, priority requirements, etc. See, e.g., the following reported cases in which individuals stranded in the United States were unable during the war to return to their homes in such countries as Denmark and Sweden: *McGrath* v. *Kristensen*, 340 U. S. 162; *Benzian* v. *Godwin*, 168 F. (2d) 952 (C. A. 2); *Seeley* v. *Commissioner of Internal Revenue*, C. A. 2, decided January 2, 1951, not officially reported as yet (unofficially reported in 1951 P-H Fed. Tax Service, Par. 72,213).

intent were not to remain in the United States but to return to his family in Europe as soon as it was possible to do so (R. 21).

On January 15, 1941, a warrant of arrest was issued by the United States immigration authorities, charging that petitioner was in the United States in violation of the immigration laws and subject to deportation (R. 11). The warrant provided for his release on bond (R. 11). He was arrested and, after a deportation hearing, the Board of Immigration Appeals entered an order, dated February 3, 1944, requiring the petitioner to depart from the United States within 90 days after the termination of hostilities (R. 11). War time conditions made it impossible or impracticable for the immigration authorities to deport the petitioner to his home in Europe prior to the end of the European War (R. 21). The petitioner remained at liberty under bond until his voluntary departure in August 1945 (R. 11).

During his stay in the United States, the petitioner engaged in transactions in securities and commodity futures effected through United States resident brokers. As a result of such transactions, he realized substantial capital gains, the taxability of which is here in question (R. 15-17). If petitioner was a resident alien, he was taxable on such capital gains. If, however, he was a nonresident alien, he was not taxable thereon, unless, during the taxable years in question, such transactions constituted engaging in trade or business in the United States.

The petitioner contends that he was a nonresident alien during the years in question, since he was under constraint and incapable of exercising the volition basic to residence. The constraint was of two types: (1) inability due to war conditions to return to his home in Europe, despite repeated efforts and constant desire to leave the United States, and (2) inability under the immigration laws to remain in the United States beyond the period when the orders of arrest and deportation could be executed and the petitioner expelled. Either type of constraint would, peti-

tioner contends, have prevented him from exercising the free choice and free will essential to establishing a residence in the United States.

As to his transactions in securities and commodity futures while in the United States, petitioner contends that such could not constitute engaging in trade or business because they were effected directly through resident brokers and, under the express provision of Section 211(b) of the Internal Revenue Code, such transactions do not constitute engaging in trade or business. He also contends that, wholly aside from this provision of Section 211(b), engaging in such transactions for one's own account cannot constitute engaging in trade or business, no matter how extensive such transactions may be and regardless of whether they be of a speculative or investment nature.

The Tax Court sustained the petitioner's contentions both as to residence and as to engaging in trade or business. The Court of Appeals reversed on both points, holding that the petitioner was a resident alien for the years in question and that he was engaged in trade or business in the United States by reason of his securities and commodities transactions. As to the latter point, although the statute contains no such limitation, the Court held that the aforesaid express provision of Section 211(b) was not intended to apply to nonresident aliens who were physically present in the United States when the transactions were effected and was only intended to apply to nonresident aliens who were abroad when the transactions were effected.

Specification of Errors

The Court of Appeals erred:

(1) In holding that the petitioner was a resident alien during the taxable years in question.

(2) In exceeding its proper scope of review by making *de novo* findings of fact and by drawing inferences of fact, on conflicting evidence, contrary to those drawn by the Tax Court, such findings and inferences relating to the purpose

and intention of the petitioner in remaining in the United States.

(3) In holding that the express provision of Section 211(b) of the Internal Revenue Code (providing that the effecting by nonresident aliens of transactions in securities and commodity futures through resident brokers does not constitute engaging in trade or business in the United States) does not apply to nonresident aliens physically present in the United States.

(4) In holding that engaging in such transactions for one's own account constitutes engaging in trade or business, aside from the aforesaid statutory provision.

Reasons for Granting the Writ

1. The Residence Issue

The writ should be granted to review the residence issue because (a) the issue involves an important question of Federal income tax law which has not been, but should be, settled by this Court; (b) the principle of the instant decision is in conflict with decisions of this Court and of other Circuit Courts on the question of residence; and (c) the instant decision conflicts with decisions of this Court limiting the scope of review under Rule 52(a), Federal Rules of Civil Procedure.

(a) The instant case is the first to reach this Court involving the residence status for Federal income tax purposes of aliens, marooned in the United States by war time conditions arising out of World War II, who were unable for the duration to return to their homes abroad. The instant case has been regarded as a test case by the United States income tax authorities, and a substantial number of similar cases have awaited, and are awaiting, either in litigated or administrative stages, the ultimate decision in this case. The question as to the residence consequences of an enforced stay is one of paramount importance in the

administration of the income tax laws, both with respect to situations resulting from world-wide conflicts, and also with respect to other situations not caused by war where the taxpayer in question is deprived of any free exercise of volition as to his stay.

Particularly is this true in view of the fact that in the thirty-eight years in which the Federal income tax laws have been in effect, there has never been a decision of this Court on the subject of residence for income tax purposes. The question of residence has greatly troubled the Circuit Courts. The terms "residence" and "nonresidence" are "very slippery words" (Dobie, J. in *Swent* v. *Commissioner of Internal Revenue,* 155 F. (2d) 513, 515, C. A. 4). The regulations defining residence issued by the Treasury Department are themselves vague and unclear. After stating that the regulations appear to contain inconsistencies, Stephens, J. said in *Downs* v. *Commissioner of Internal Revenue,* 166 F. (2d) 504, 509 (C. A. 9):

> "* * * Despairing of being able to satisfactorily define the term 'resident,' the Treasury Department has resorted to a sort of inclusion-exclusion of the words 'resident' and 'transient' through statements of hypothetical facts. The word 'transient' is not mentioned in the act, and its use appears somewhat confusing. However, the regulation is to be used in *principle* only."

In this state of the law, and in the absence of any decision of this Court, under the Federal income tax law, on either the general subject of residence or the effect on residence of the element of constraint, the issue is one which should be reviewed by this Court so that taxpayers and income tax authorities may know where they stand with respect to the duties imposed by residence.

(b) *The decision of the Court of Appeals in the instant case directly conflicts in principle with the very recent decision of this Court in McGrath* v. *Kristensen, 340 U. S. 162, decided December 11, 1950.* In the *Kristensen* case, an alien

who came to the United States in 1939 for temporary purposes and was unable due to war time conditions to return to his home in Europe was held *not* to be a resident of the United States for purposes of the Selective Training and Service Act. *The factual parallel with the instant case is striking.* Both aliens came to the United States in August 1939, both came to see the New York World's Fair, both were admitted on temporary visas, both were unable to return to their homes in Europe due to war conditions, both were subject to orders of deportation and both remained in the United States for the duration of the war.[2] In the *Kristensen* case, this Court stated (p. 176) that it could not conclude, without regulations so defining residence, that "a *sojourn* within our borders made necessary by the conditions of the times was residence within the meaning of the statute" (italics added). It is clear that, in view of the circumstances, this Court regarded Kristensen as a mere sojourner despite the length of his stay. Under the Treasury Department's own Regulations (Reg. 111, Sec. 29.211-2), an alien who is a "mere sojourner" is not a resident alien for Federal income tax purposes. The conflict in reasoning of the instant case with the *Kristensen* decision is thus forcefully illustrated. *Moreover, in the instant case, as in the Kristensen case, there is the same absence of regulations defining residence as including a sojourn in the United States made necessary by war time conditions.*

It is true, of course, that the meaning of the term "residence" varies with the purpose and intent of the statute in which it is found. It is also true that the *Kristensen* case arose under a statute different from that here involved. But, as Judge Learned Hand pointed out in *Neuberger* v. *United States,* 13 F. (2d) 541, 542 (C. A. 2), in language

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[2] The instant case is even a stronger case of nonresidence than the *Kristensen* case. In the instant case the petitioner, after the termination of hostilities, returned to his home in France and has resided there ever since (R. 10). By contrast, Kristensen married an American citizen and settled down to permanent residence in the United States.

quoted with approval by this Court in its *Kristensen* decision (p. 175), "there is substantial unanimity that, *however construed in a statute,* residence involves some choice * * * and that *presence elsewhere through constraint has no effect upon it.*" (italics added). And, as the Court of Appeals for the District of Columbia said in the *Kristensen* case (179 F. (2d) 796, 801), "*wherever used* [in a statute], *the term* [*residence*] *has an irreducible minimum of meaning*" and "requires at least an abode which is in some degree permanent and *is the result of choice.*" (italics added). Again, at page 802, the Court of Appeals said:

> "* * * Presence in a foreign land because of war, and the attendant inability to return to one's own country, does not possess the volitional element which is basic to residence. * * *"

In view of the foregoing, it is clear that *no matter what statute is involved,* residence involves a free exercise of volition which does not exist in a case where the individual is under constraint. Since the petitioner was under constraint of two types (inability to return to his home and refusal of the immigration authorities to allow him to remain in the United States beyond the time when he could be expelled), there is a clear conflict in principle with the *Kristensen* case and with the *Neuberger* case as well.[3] *The conflict with the Kristensen decision is accentuated by what the Court of Appeals in the Kristensen case (p. 803) called "the similarity in origin of the obligation to pay taxes and the obligation of military service."*

(c) Finally, the decision in the instant case conflicts with the recent decisions of this Court in *United States* v. *Real Estate Boards,* 339 U. S. 485 and *United States* v. *Yellow Cab Co.,* 338 U. S. 338, in that the Court of Appeals exceeded its proper scope of review by making *de novo* findings of fact and, on conflicting evidence, drawing inferences of fact contrary to those drawn by the Tax Court. The Court of Appeals found as a fact that the petitioner's

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[3] The *Neuberger* case involved the residence status under the naturalization laws of an alien resident of the United States who was marooned in Germany during World War I.

original temporary purpose in coming to the United States "was superseded after the war had commenced and travel had become difficult and dangerous by the purpose to remain in the country until after the war" (R. 50) and found further that petitioner "had the intention of staying here until the war in Europe had ended and he could safely depart" (R. 48). These findings were either *de novo* findings of fact by the Circuit Court which has no power to make new findings of fact (*Helvering* v. *Rankin,* 295 U. S. 123), or they were inferences of fact, on conflicting evidence, which the Circuit Court had no power to substitute for those drawn by the Tax Court. As this Court said in the *Yellow Cab Co.* case (p. 341), the Government is not permitted to come to an appellate court "for what virtually amounts to a trial *de novo* on such findings as intent, motive and design," and, as this Court further stated in that decision, "a choice between two permissible views of the weight of evidence is not 'clearly erroneous.' "

The Tax Court found that the petitioner in late April 1940 intended not to return to the United States if he were granted entry to Mexico (R. 12); that petitioner remained in the United States only "because of the obstacles which war time conditions put in the way of his leaving this country" (R. 22); and that "almost all of the affirmative acts of the petitioner confirm his testimony that he did not intend to become a resident of the United States" (R. 21). The Tax Court completely rejected the contention which the Commissioner strenuously urged that the petitioner intended to remain in the United States for the duration of the war. The clear and inescapable implication of its findings is that the petitioner at all times intended to leave the United States and was only prevented from doing so by war time obstacles. The Tax Court's findings were supported by strong and substantial evidence as to the petitioner's efforts to leave the United States (R. 12, 13), as to his statements of intention expressed to friends and Government officials (R. 21), as to the practical impossibilities of war time travel (R. 21), as to the visa complications, particularly for an Egyptian citizen (R. 13, 14), etc.

Whatever conflicting evidence may be in the record (and it is slight), it was not within the province of the Court of Appeals which did not see or hear the witnesses to "give the facts another construction" and "resolve the ambiguities differently" (*United States* v. *Real Estate Boards, supra,* at p. 495).

It should be emphasized in conclusion that, even if we assume, *arguendo,* that the Court of Appeals was justified in finding that the petitioner intended to remain in the United States once he found that war time obstacles prevented his return to Europe, its conclusion that petitioner thereby became a resident was wholly unjustified and in direct conflict with the principle of the *Kristensen* and *Neuberger* cases. For residence, as is shown by those cases, necessarily involves freedom of choice. Carried to its logical conclusion, the reasoning of the Court of Appeals would mean that a prison inmate would become a resident of his prison, since once he found that he could not escape, he would be deemed to intend to remain where he was. This clearly is not the law. *United States* v. *Gronich,* 211 Fed. 548 (W. D. Wash., S. D.), and cases cited therein. Consequently, even accepting in full the new factual findings and inferences of the Court of Appeals, there was no basis in law for its conclusion.

2. The Doing Business Issue

The writ should be granted to review the doing business issue because (a) the issue involves an important question of Federal income tax law which has not been, but should be, settled by this Court and (b) the decision of the Court of Appeals conflicts in principle with decisions of this Court and of other Circuit Courts.

(a) This issue involves a statute which in plain, simple and unequivocal language declares that the effecting by nonresident aliens of transactions in securities and commodity futures through resident brokers shall not constitute engaging in trade or business in the United States. (For complete text of statute, see Appendix, *infra,* p. 19.) The Court of Appeals held in the instant case that this pro-

vision should be interpreted as not applying to such aliens when physically present in the United States. No report of any Congressional committee or other authority is cited to support this distinction read into the statute. In fact, the Court in its opinion ignored completely the legislative history of the statute, including several proposed and actual amendments to the statute, which provided that, for years *subsequent* to those here involved, a distinction should be made between nonresident aliens physically within and without the United States and that only under certain specified conditions should nonresident aliens physically present in the United States be subject to tax on capital gains effected in the United States.[4] ***The hearings and committee reports on these amendments show conclusively that not only Congress and the Joint Committee on Internal Revenue Taxation, but the Treasury Department itself, understood that under existing law such gains were not taxable to nonresident aliens merely because they were physically present in the United States.***[5]

Moreover, the Court of Appeals ignored the fact that Congress in the statute, and the Treasury Department in its regulations, have always used the term "nonresident alien" in its broadest sense without drawing any distinction whatsoever between such aliens physically present in the United States and those remaining abroad. Under court

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[4] See Hearings before Senate Finance Committee on H. R. 4790, 80th Congress, 2nd Session, p. 170, at which Senator Lodge offered such an amendment. A similar provision was contained in Section 143(a) of H. R. 6712, 80th Congress, 2nd Session. Neither of these provisions became law, but in Section 213 of the Revenue Act of 1950, Public Law 814, substantially similar provisions were enacted, effective January 1, 1950. These provisions are now found in Section 211(a)(1)(B) of the Internal Revenue Code.

[5] See Hearings before Senate Finance Committee, on H. R. 4790, 80th Congress, 2nd Session, p. 170; House Ways and Means Committee Report on H. R. 6712, 80th Congress, 2nd Session, p. 7; Hearings before House Ways and Means Committee on Revenue Revision of 1950, 81st Congress, 2nd Session, Vol. I, p. 74; Senate Finance Committee Report on Revenue Act of 1950, 81st Congress, 2nd Session, pp. 46, 92.

decisions in income tax cases extending as far back as 1931,[6] and under regulations of the Treasury Department itself,[7] it has long been recognized that aliens may be physically present in the United States and yet remain nonresidents. Under these conditions, Congress has repeatedly re-enacted the statute in question, and the Treasury Department has consistently maintained the same regulations in effect, without the slightest attempt on the part of either to limit the broad term "nonresident alien" to those outside the United States.

That Congress intended the provision relating to security and commodity transactions to apply to all nonresident aliens, whether physically within or without the United States is further established beyond doubt by other provisions in Section 211(b) not dealing with security and commodity transactions. In prescribing the circumstances under which the performance of personal services by nonresident aliens would constitute engaging in trade or business, Congress carefully distinguished between nonresident aliens "temporarily present in the United States for a period or periods not exceeding a total of ninety days during the taxable year and whose compensation for [personal] service does not exceed in the aggregate $3,000," and those nonresident aliens who are here for longer periods. *Yet, in the very next sentence of the statute, relating to transactions with resident brokers, no distinction of any sort has ever been drawn between such transactions effected by nonresident aliens physically present in the United States and those effected by nonresident aliens remaining abroad.* On the contrary, the sentence is phrased in the broadest terms and with no exclusion whatever of any class of nonresident aliens. In view of the foregoing, the conclusion that Congress in referring to nonresident aliens meant only those outside the United States is on its

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[6] See, e.g., *Ingram* v. *Bowers*, 47 F. (2d) 925 (S. D. N. Y.), affd. 57 F. (2d) 65 (C. A. 2).

[7] See, e.g., Reg. 45, Art. 312, issued under Revenue Act of 1918. Similar provisions have been contained in the regulations issued under all the subsequent revenue acts.

face wholly unwarranted, especially when viewed in the light of the recent legislative history of the statute previously discussed herein.

The petition herein does not rest exclusively, however, upon the error in construction of the statute, important as that question continues to be.[8] Basic to the entire issue is the question whether, *even if no such statutory provision existed,* the petitioner could be deemed to have been engaged in trade or business. It is essential to support the decision of the Court below on this issue that the petitioner be found to have been engaged in trade or business. If the statutory exclusion does not apply, the question remains whether, aside from the statute, the petitioner was engaged in trade or business. *Consequently, the underlying question on the doing business issue is whether, under any circumstances, transactions in securities and commodity futures for one's own account may constitute "engaging in trade or business."* For purposes of Section 23(a)(1) of the Internal Revenue Code, this Court in 1941 affirmed a decision of the Board of Tax Appeals holding that market activities for one's own account, no matter how extensive, could not constitute "carrying on any trade or business," so as to permit the deduction of expenses incurred in connection therewith. *Higgins* v. *Commissioner of Internal Revenue,*

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[8] The provisions of Section 213 of the Revenue Act of 1950 have diminished the importance of the question of statutory construction for the future, but the issue remains significant for its effect (1) on other pre-1950 cases, pending in either litigated or administrative stages; (2) on securities transactions with United States resident brokers effected by nonresident foreign corporations through a United States agent, such corporations having under the statute a similar exemption for security and commodity transactions with resident brokers; (3) on the construction of the term "permanent establishment" in tax treaties with such countries as Canada, France, Sweden and the United Kingdom, to which treaties Section 213 of the 1950 Act has no application; and (4) on situations where nonresident aliens physically present in the United States for less than ninety days in the taxable year engage in securities transactions through resident brokers in volume while in the United States and continue such transactions from abroad (after leaving the United States) during the same taxable year.

312 U. S. 212. Since that decision, the principle involved has been applied, both with respect to Section 23(a) (1) *and with respect to other sections of the Code where the issue of engaging in, or carrying on, trade or business has arisen.* See, e.g., *Fuld* v. *Commissioner of Internal Revenue,* 44 B. T. A. 1268, affd. 139 F. (2) 465 (C. A. 2); *Burnett* v. *Commissioner of Internal Revenue,* 118 F. (2d) 659 (C. A. 5).[9] The question whether the principle involved in the *Higgins* case should have equal applicability in determining the question of doing business under Section 211 of the Code is one of the utmost importance in the administration of the income tax laws.

(b) *The decision in the instant case conflicts in principle with the decision of this Court in Higgins* v. *Commissioner of Internal Revenue, supra.* No sound reason is perceived, and none has been advanced, why the *Higgins* principle should not be applicable in determining the issue of doing business under Section 211 of the Internal Revenue Code.[10] As previously stated, the doctrine has been applied with respect to sections other than 23(a) (1). The Court below relied heavily on the *Fuld* decision, *supra,* to support its position on this issue. In the *Fuld* case, a distinction was drawn between personal market activities on an investment basis and similar activities on a speculative basis, only the latter being considered to constitute engaging in trade or business. Assuming, as the Tax Court found (R. 22), that the transactions of the petitioner herein were of a speculative

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[9] *Cf.* Senate Finance Committee Report on Revenue Act of 1950, 81st Congress, 2nd Session, p. 106, where in discussing the newly imposed tax on the unrelated business income of charitable and other exempt organizations, it is said: "As used in this section, the term 'trade or business' has the same meaning as it has elsewhere in the Code, as, for example, in Section 23(a) (1)."

[10] The argument that Congress would not have inserted the statutory exclusion in Section 211(b) if such transactions, apart from the statute, could not constitute engaging in trade or business, is unsound, since the exclusion was inserted in the statute prior to this Court's decision in the *Higgins* case and at a time when it was thought that even personal investment activities might constitute engaging in trade or business.

nature, it is contended that the distinction drawn between speculative and investment activities is an arbitrary and artificial one which this Court in its *Higgins* decision never contemplated would be drawn. This Court granted certiorari in the *Higgins* case because it stated that there was a conflict between the Second Circuit's decision in the *Higgins* case (111 F. (2d) 795) and the Sixth Circuit's decision in *Kales* v. *Commissioner of Internal Revenue* (101 F. (2d) 35). Since the *Kales* case was one of a taxpayer engaged in security transactions, not on an investment basis but on a basis of adventuring her own capital and securities, such fact indicates that this Court in granting certiorari intended to lay down only one rule for dealing in securities for one's own account, whether such dealings be on an investment, speculative or other basis. Furthermore, two other Circuits, in cases decided after this Court's decision in the *Higgins* case, have supported the position taken herein that personal market activities on a so-called speculative basis do not constitute engaging in trade or business. *Helvering* v. *Wilmington Trust Company*, 124 F. (2d) 156 (C. A. 3), reversed on other grounds, 316 U. S. 164; *Burnett* v. *Commissioner of Internal Revenue, supra.* In the *Wilmington Trust Company* case, the Court said (pp. 159, 160):

> "* * * The Board of Tax Appeals here can only distinguish its own conclusion in the Higgins case by calling the stock dealings speculative rather than investive because of their size and frequency. Taxpayer Higgins had not only one but two offices (one in Paris) and employed not one secretary but several. He was mainly interested, however, in just conserving and enhancing his own estate. In the present case, as in Kales v. Commissioner, the taxpayer was principally 'adventuring his [her] own capital in securities, yet is actively and continuously occupied in their purchase and sale.' We agree with Judge Patterson that it is a difference but not one of distinction. The Supreme Court gave some indication that no legal difference may be made of this factual difference when it granted certiorari in the Higgins case on the ground that the decision of the Second Circuit conflicted with Kales v. Commissioner."

Consequently, should the instant decision be supported on the ground that the petitioner's transactions herein were of a speculative nature, there is a clear conflict in principle on this point between the instant case and the *Fuld* decision, on the one hand, and the *Wilmington Trust Company* and *Burnett* decisions, on the other hand.

Wherefore, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

Henry Mannix,
Counsel for Petitioner.

Charles K. Rice,
Of Counsel.

APPENDIX

Internal Revenue Code:

SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

* * * * *

(b) *United States Business or Office.*—[11]A nonresident alien individual engaged in trade or business in the United States or having an office or place of business therein shall be taxable without regard to the provisions of subsection (a). As used in this section, section 119, section 143, section 144, and section 231, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year, but does not include the performance of personal services for a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, by *a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of ninety days during the taxable year* and whose compensation for such services does not exceed in the aggregate $3,000. *Such phrase does not include the effecting of transactions in the United States in stocks, securities, or commodities through a resident broker, commission agent, or custodian.* (italics added)

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[11] The above provision was effective for the taxable year 1941. For the taxable years 1942 through 1944, the statute was the same, except that the phrase "or having an office or place of business therein" contained in the first sentence above was omitted and, in place of the last sentence in the above, the following sentence was added: "Such phrase does not include the effecting, through a resident broker, commission agent, or custodian, of transactions in the United States in commodities (if of a kind customarily dealt in on an organized commodity exchange, if the transaction is of the kind customarily consummated at such place, and if the alien, partnership, or corporation has no office or place of business in the United States at any time during the taxable year through which or by the direction of which such transactions in commodities are effected), or in stocks or securities.